

BOMBAY HIGH COURT

Bai Appibai

Vs.

Khimji Cooverji

O.C.J. Suit No. 990 of 1934

(B.J. Wadia, J.)

14.12.1934

JUDGMENT

B.J. Wadia, J.

1. Plaintiff has filed this suit for a declaration that she was validly married to the defendant on March 31, 1934, at Ujjain, which is in the Gwalior State, and for an order for separate maintenance and residence against the defendant. She also claims certain ornaments or the price thereof which defendant had, according to her, promised to give her at the time of the marriage, and a further sum of ₹ 6,200/- which represents the amount of her indebtedness to different creditors which he had also promised to pay at the same time. The defendant contends that this Court has no jurisdiction to try the suit. He denies that there was any ceremony of marriage according to the Hindu rites. His case is that he went through a ceremony of marriage, but some of the essential marriage rites were not performed. He also contends that the marriage was not registered in the records of the Gwalior State, as required by the law of the State, and was therefore not valid, but that contention was abandoned at the hearing. Defendant further contends that he was induced to go through a marriage ceremony on certain representations made to him by the plaintiff or on her behalf and with her authority, which representations turned out to be false and therefore rendered the marriage null and void in law. He denies liability to provide for the separate maintenance and residence of the plaintiff, and for the ornaments and moneys claimed by her.

2. The first issue is one of jurisdiction. It is alleged in the plaint that this Court has jurisdiction, as defendant resided and carried on business in Bombay on the date of the suit, and a part of the cause of action arose in Bombay. Defendant denies this. According to him he has been living permanently in Ujjain since 1930, and only occasionally comes to Bombay, and he did not carry on business in Bombay at the time of the filing of the suit or for a considerable time prior thereto. He had a family house at Nepean Sea Road in Bombay where he formerly lived jointly with his two sons Ramdas and Gopaladas, but there was a partition between him and his sons in 1926-1927, since when the Nepean Sea Road property as well as another property were held by him and his sons in severalty. Thereafter, in 1930, a suit was filed against him and another by the

Indian Cotton Co., Ltd., and another suit was filed by his son Gopaldas against him and others. In both those suits a consolidated consent decree was taken on April 17, 1931. In pursuance thereof there was a deed of partition executed on May 27, and he ceased to have any interest in the properties, as he assigned his interest to his sons in consideration of their taking over his liability to the Indian Cotton Co. and paying certain debts due and payable by him. It was alleged that in the deed of partition the defendant has been described as a Bhatia Hindu inhabitant of Bombay, that as late as November 1933 he transferred a house at Nasik belonging to him to certain purchasers, and that in the conveyance he was also described as an inhabitant of Bombay. None of these documents has, however, been produced in Court. It is true that defendant lived in the Nepean Sea Road house till May 1934, and in the Directory of the Bombay Telephone Co. issued in June 1934 the telephone number of the house, No. 42981, still stood in his name. Defendant, however, stated that the house had since been sold by his sons, and that at present he was staying with a friend at Ville Parle outside Bombay. The defendant is also a Justice of the Peace for the town and island of Bombay according to the notification in the Bombay Government Gazette, and it was argued that as such he could not be a permanent resident of a place outside British India. This is all the evidence as to his residence, and I cannot say that it is sufficient for the purpose of showing that the defendant dwelt in Bombay at the date of the suit.

3. With regard to the defendant's business it was admitted that he was a partner in the firm of Ramdas Khimji & Co. which carried on business as Muccadams in Bombay. He said that that firm was dissolved at the end of 1933* but it appears that on September 30, 1933, the firm applied for registration to the Registrar of Firms, and it was registered on December 12, 1933, under number 2785, showing the defendant as one of the partners of the firm. He said that there was a resolution passed by the members of the firm some time in December of its dissolution, but beyond his word there is no evidence of the dissolution, and in any event the accounts of the partnership have not yet been made up. The defendant, however, admitted that; on the dissolution another firm was started in the beginning of 1934 under the name of Ramdas Khimji & Brothers in which he was also a partner. That firm also did the business of Muccadams. He became a partner in the new firm as he was desirous to recoup his share of the losses of Ramdas Khimji & Co., but that he resigned as a partner on May 26, 1934, and gave letters of resignation to his sons as of that date, after which the sons stopped paying him anything out of the firm. These letters were not referred to by him until his re-examination. It is alleged in them that he retired because of his old age. In his evidence he said that he retired both on account of his old age as well as on account of the plaintiff's claim against him. Realizing that no claim had been made on May 26, he said later on that he retired because his sons wished him to retire on account of the disputes that arose between them and him over his marriage. On his own showing he was not taking any active part in the business for some time, and there was, therefore, no reason why his sons wanted him to retire from a business in which he took no active part. His sons, however, advertised in the Bombay Samachar of June 1, 1934, that he had retired as from May 26, but defendant put in a counter-advertisement on June 14 stating that he had not. It suits him now to say that in fact he had retired from the business in order to support his defense of want of jurisdiction. The genuineness of the letters of resignation has been doubted, and I do not place much reliance on them. There is no acceptance of the resignation by the sons. There is also no writing that after his resignation he would not be liable for losses, and for all purposes he still continues to be a partner and can claim accounts from the other partners of the firm. There is no evidence that he received a certain sum per month, and that his sons have stopped payment, beyond his bare word which I am not prepared to accept. On his own admission contained in his

advertisement he has not retired from the firm, and presumably he is still carrying on business in Bombay. It is not necessary that he should for the purposes of the business continue to stay in Bombay, nor need the business be carried on by him personally. None of his sons, nor any of his other partners, has been called to give evidence in support of what he stated. Defendant has also a current account with various Banks in Bombay on which he has been drawing from time to time, and even after the suit was filed. He is a director of several mills and attends directors' meetings in Bombay. The firm had also a " pedhi " in Bombay, though it is said to be no longer in existence. Taking all these facts and circumstances into consideration I hold that the defendant did carry on business in Bombay at the time of the commencement of the suit.

4. Under the circumstances it is not necessary for the Court to consider whether any part of the cause of action in the suit arose in Bombay. The plaintiff alleges that the promises about the ornaments and about paying off her debts which she seeks to enforce and the agreement of marriage were made in Bombay. Defendant has denied these promises, and he also denies that the agreement of marriage was made in Bombay. I will deal with the promises later, but there is no doubt on the evidence that the parties agreed in Bombay to marry each other. It was contended by the defendant's counsel that the cause of action based on the promise to marry was distinct from the cause of action based on the marriage itself which took place in Ujja in, and no leave was obtained under d. 14 of the Letters Patent for joining the several causes of action. In my opinion these are not separate causes of action as required by d. 14; the promises were to be carried out by the defendant on the marriage being performed. It is, however, not necessary for me to consider the point in further detail, as I have already held that the defendant carried on business in Bombay at the date of the suit, and the suit is, therefore, within the jurisdiction of this Court.

5. The next point in dispute between the parties is whether there was a legal and valid marriage between them. Plaintiff contends that she was legally married to the defendant according to the Vedic or Hindu rites on March 31, 1934, and that since then she lived with the defendant as his wife until disputes arose between her and the defendant in May, 1934. The defendant is a Kshatriya by caste. Plaintiff says she is also of the same caste. I do not believe the defendant when he said that the plaintiff told him that her mother was a Brahmin and her father was a Kshatriya. Under the Hindu law the parties to a marriage must, unless it is otherwise allowed by custom, belong to the same caste, though they may be members of different sects or subdivisions of the same caste. If the wife belonged to a higher caste than the caste of her husband, the marriage would be a 'Pratiloma' marriage, which is illegal; but if the wife belonged to a lower ' caste than the caste of her husband, the marriage would be an ' Annloma' marriage, which has been held to be valid in Bombay. The question, however, does not arise here, as both parties stated that they were Kshatriyas, and nothing further was said about it. There are two ceremonies essential to the validity of a Hindu marriage, viz., the invocation before the consecrated fire, and the saptapadi or the taking of seven steps by the bridegroom and bride jointly before the consecrated fire. The marriage becomes perfect and irrevocable only when the seventh step is completed, for it then creates a religious tie which once tied cannot be untied. When once celebrated, the marriage cannot be dissolved, even if it has been irregularly performed. It has also been held that when it is proved that a marriage was performed in fact, there is a presumption of there being a marriage in law: see *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver¹* *Fakirgauda v. Gangi²* There is also the presumption that if some of the ceremonies usually observed on such occasions have been performed, they have been duly completed: *Bai Diwali v.*

*Moti Karson*³ see also *Mouji Lal v. Chandrabati J' Kumari*⁴

6. Plaintiff stated that she came to know the defendant some time in January, 1934, whereas defendant said that he met her first in February, 1934. The plaintiff is a "naikin" or dancing girl by profession, and was in the keeping of several persons as mistress from time to time. She said she was in the keeping of one Ramchandra Kamat, but she left him years ago, and thereafter Kamat died. Defendant stated that plaintiff told him that Ramchandra Kamat was her husband, and that she was his widow, and she actually showed him Ramchandra's photo in her room as that of her deceased husband. Plaintiff denied that she ever said that she was a widow, and no question was put to her about the photograph. Until December, 1933, she was in the keeping of another man who died about that time. When she was in his keeping, she was living at Ridge Road, but she shifted to Abubakar Mansion, Walkeshwar, in November, 1933, and it was there that she met the defendant. There is considerable difference in the two versions of the meetings and negotiations between the plaintiff and the defendant before the marriage. Plaintiff said that the defendant's intimacy with her soon grew, and she suggested that she should be his "bundhi", i.e. she should remain in his exclusive keeping as mistress, whereas the defendant proposed to marry her, and promised to give her the ornaments which he had made for his two predeceased wives and which he said, were worth about ₹ 35,000/-, pay off her debts, and provide her with a separate house and car in Bombay. Defendant denied having made any such promises or having at that time proposed marriage to the plaintiff. He said, that it was one Narsinhrao who saw him first and suggested the idea of marriage to him. Narsinhrao is a Government contractor at Karwar. He comes from the same place from which the plaintiff comes, and he said that he knew her well, as he had formerly built for her a house there. He corroborated the plaintiff except as to the promise to pay her debts. It is common ground that the plaintiff thereafter twice went to Ujjain on receipt of wires from the defendant and stayed with him in his house, on the first occasion for a day, and on the second for three days. According to her the ornaments were shown to her by the defendant on the occasion of her second visit to Ujjain, and she enumerated them with the prices which she said the defendant mentioned to her. The subject of marriage was again broached at Ujjain, and defendant admits that there was such a talk, but he denied having shown the ornaments. He said that he told her that he would see if a "civil marriage" was possible and make inquiries. According to the plaintiff she and the defendant and Narsinhrao returned to Bombay together; defendant, however, stated that he came alone subsequently. He saw her in Bombay at Abubakar Mansion, and paid her small sums of money and a sum of ₹ 150/- by cheque. He also transferred a Government Promissory Loan Note of ₹ 500/- into the joint names of himself and plaintiff. He admits that plaintiff told him to do so as he was about to marry her. It was about this time that the agreement to marry was arrived at in Bombay. About a week before March 31 plaintiff and defendant again left for Ujjain, and plaintiff lived there in the defendant's house. Arrangements were then made for the marriage by one Nanakprasad, an Arya Samajist,

¹(1869) 13 M.I.A. 141

³ I.L.R. (1896) 22 Bom. 509

² I.L.R. (1896) 22 Bom. 277

⁴(1911) L.R. 38 I. A. 122 : 13 Bom. L.R. 534

and Assistant Secretary of the Vidhava Vivah Sahaik Sabha working under the supervision of Sir Ganga Ram Trust Society at Ujjain, and the parties were married at Ujjain on March 31, 1934.

7. On the day of the marriage both the plaintiff and the defendant signed certain forms respectively. The plaintiff said that she did not know how to read or write English or Marathi or

Hindi, and that she could only sign her name in English. The form is in English with the Hindi translation of certain particulars which are to be filled in. The form signed by the plaintiff is Exhibit B, and that signed by the defendant is Exhibit C. The answers on the right hand side are in English. They were admittedly written by one V. R. Vogel who according to the defendant was once his correspondence clerk, but who according to the plaintiff had introduced himself to her in Bombay as the defendant's private secretary. Defendant stated that the plaintiff gave the particulars to Mr. Vogel in his presence, and what was written down by Vogel was read and explained to her. Mr. Vogel has been examined on behalf of the defendant, but his story was somewhat different. According to him, he first made a rough draft of the plaintiff's answers to the particulars in the form on March 30, then entered them fair in the form itself, and he read out the answers to the plaintiff. In his affidavit on the notice of motion for interim maintenance he did not refer to any incident on March 30 at all, and further stated that the plaintiff read the answers herself. Plaintiff denied that the answers were either read or explained to her. She was not sure who gave her the form to sign. At one time she said it was Nanakprasad. Then she said it was given to her by Vogel. Thereafter she stated that defendant asked her to sign. It is, however, a "Widow's Application Form for Marriage", and plaintiff has signed the declaration clause that the contents are correct. Defendant also signed his form headed, "Gentleman's Application Form for Marriage", and the particulars were furnished to Mr. Vogel by himself. He is there described as a widower for the last seven years, whereas in fact he stated that he had been a widower for much more than that. Plaintiff is described as the widow of Ramchandra Kamat in the form which she signed, as both according to the defendant and Mr. Vogel she represented that she was a widow. I will deal with the subject of the defendant's representations later. It may, however, be here mentioned that the defendant said that there was also a third form which was filled in but which has not been preserved. According to the defendant it provided that in the event of dispute between him and the plaintiff after marriage he was to give her ₹ 10/- per month for maintenance, whereas according to the plaintiff it was provided in that form that after the defendant's death the house at Ujjain was to belong to her.

8. It was Nanak prasad who arranged for the marriage ceremonies, and he has been examined de bene. He first alleged in his affidavit on the notice of motion that he had officiated at the marriage as one of the priests, and defendant says so himself in his written statement. This was evidently a mistake, for he only supervised the ceremonies which were performed in his presence by Vasantilal Mulchand who is the 'Purohit' or the priest of the Arya Samaj, assisted by another 'Purohit' or priest, one Ganeshilal. J. Nanakprasad stated that the ceremonies lasted two to two and a half hours. He has not described them in detail, but he denied that the parties were made to sit face to face with the sacred fire between them as alleged. Doubt has been thrown on his evidence both by the defendant and the plaintiff, but he has been corroborated substantially by Vasantilal who was also examined de bene, and Vasantilal has described the ceremonies in detail. Vasantilal stated that the knot was tied between the end of the plaintiff's sari and the defendant's shawl or "dupatta", that the "pradakshna" ceremony of going round the fire was performed by the plaintiff and the defendant, and that the ceremony of "saptapadi" was also performed by them jointly taking seven steps together near the consecrated fire. Plaintiff herself has also described the ceremonies which according to her lasted from 12 to 3 p. m., and not for twenty minutes as falsely alleged by the defendant, and she has substantially corroborated Vasantilal except as to the order in which the ceremonies were performed and except that she said that there were seven "pradakshna" whereas Vasantilal stated that there were four. Defendant denied that

the knot was tied or the "saptapadi" was performed, but he could not explain why they were omitted. According to his information and belief these ceremonies were not necessary for a widow re-marriage, but only the four "pradakshna" ceremony was necessary, which according to Vasantilal was performed. He has, however, admitted that he wanted the plaintiff to be his lawfully wedded wife according to the necessary Hindu rites. He has also admitted to the Court, though very reluctantly, that he did agree to marry the plaintiff, that in pursuance of the agreement he married her, and thereafter lived together as husband and wife until the separation in May. In my opinion there is no doubt that there was a valid and binding marriage between the parties.

9. The defendant, however, further contends that the marriage is null and void and of no legal effect because of certain representations made to him by the plaintiff or on her behalf and with her consent, which according to him were false. The representations were that plaintiff was the widow of one Ramchandra Kamat, that she was a Brahmin by caste, that she was a person of good character, and that she was willing to live with the defendant at Ujjain, The defendant also alleges that the plaintiff suppressed from him the fact that she was a 'naikin' by profession, and the fact of her having been in the keeping of more than one person prior to her meeting the defendant in Bombay, It has been held that fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with knowledge of its nature and with the clear and distinct intention of entering into the marriage, unless one of the spouses is induced to go through a form of marriage with the other by threats or duress or in a state of intoxication or in an erroneous belief as to the nature of the ceremony and without any real consent to the marriage. A marriage might also be invalid if the girl was abducted by force or fraud and married against her wish or that of her guardian. The test of validity is whether there was a real consent to the marriage; see Halsbury, Vol. XVI, para. 514, p. 278. It is not here suggested that there were any threats or duress on the part of either party in this case. There is also no doubt that the parties gave their consent to the marriage. Defendant says that i the suggestion to marry the plaintiff came from Narsinhrao, but he admits that he himself proposed to the plaintiff to marry her, and the plaintiff agreed. The B-only difference between him and the plaintiff was that the agreement according to him was made at Ujjain, whereas the plaintiff said that it was arrived at in Bombay. I have already held that the agreement was made in Bombay.

10. In his evidence the defendant stated that the plaintiff never informed him that she was a 'naikin', that on the contrary she said that she was a widow, viz. the widow of Ramchandra Kamat, and that she actually showed him the photograph of Ramchandra Kamat as that of her deceased husband. Plaintiff denies this, and both Narsinhrao and she said that defendant was distinctly informed in Bombay that she was a 'naikin'. In his written statement the defendant said that he first came to know that she was a 'naikin' in May last, whereas in his evidence he said that he came to know of it after the filing of the suit. I do not believe the defendant when he says that the plaintiff informed him that she was the widow of Ramchandra Kamat. No doubt she is so described in the form which was signed on the day of the marriage, but her explanation was that the answers were neither read out nor explained to her, and that she merely signed the form as she was told to do so by the defendant. It seems to me that the plaintiff has been there described as a widow, as both Nanakprasad and Vasantilal were given to understand that the marriage was to be a widow remarriage, and the form itself, as I have said before, is headed as an application for a widow remarriage. Moreover, in the Government Loan Note of ₹ 500/- which was endorsed

in the joint names of the defendant and the plaintiff the name of the plaintiff is given as Appibai Arjekar. That was before the form was signed, and that does not indicate that she was the widow of Ramchandra Kamat. I do not believe the defendant when he said that plaintiff also appeared to him to be a widow. He impressed me as an unwilling witness who was never straightforward in his answers, and on whose evidence no Court could rely, nor do I believe him when he said that the plaintiff represented that she was a Brahmin by caste, though in his evidence he stated that she told him that her mother was a Brahmin and her father was a Kshatriya. With regard to the plaintiff's willingness to stay at Ujjain it has not been alleged that she agreed or was willing to stay there permanently, nor that the defendant had asked her whether she would. With regard to the representation by the plaintiff that she was a person of good character I have already held that she informed him that she was a 'naikin' and a kept mistress before the marriage. The only imputation against her character after marriage which the defendant relies on is the alleged incident of May 6, 1934. The plaintiff has denied the allegation, and I am not satisfied on the evidence that it is true. With regard to representations alleged to have been made by Narsinhrao and Gole, it has not been proved that Narsinhrao made any. Gole was not called by the defendant to show that any representations were made by him on the plaintiff's behalf. None of the representations alleged by the defendant has been proved, nor is it proved that the defendant was induced to marry the plaintiff on such representations or any of them. Even if they were made, they would not, in my opinion, affect the validity of the marriage. Moreover, marriage under the Hindu law is primarily a religious sacrament, and not a contract. It is really an unalterable transaction. The plaintiff is, in my opinion, entitled to the declaration she asks for in prayer (a) of the plaint.

11. After their marriage the plaintiff and the defendant stayed at Ujjain for about a couple of days, and they left for Bombay on April 2. They travelled in the same compartment from Ujjain, but were seated in different compartments at the time they reached Bombay. On arrival the defendant went to his house at Nepean Sea Road, and the plaintiff went to Abubakar Mansion, but they used to meet each other daily. After a week or a fortnight they left for Ujjain again, and from Ujjain they went on a week's tour to different places, at some of which the plaintiff was introduced as the defendant's wife. They returned to Bombay about April 29, and once again the defendant went to live at Nepean Sea Road and the plaintiff at her own place. After his return to Bombay the defendant was ill, and he sent for the plaintiff, and she saw him at his house. The defendant also went twice or three times to see the plaintiff at her house. It was about this time that there was some coldness growing between the plaintiff and the defendant towards one another. The reason according to her was that she was demanding the ornaments which he had promised to give her, but he was putting her off. According to the defendant the reason was that he paid her a surprise visit at her place in the afternoon of May 6, and found that she was entertaining other visitors, to which he objected. I have already stated before that these allegations have not been proved. Thereafter the defendant left for Ujjain, and the plaintiff wrote to his Munim Popatbhai to which the defendant replied by wire on May 12, asking her to come to Ujjain. She said that she wrote back to Popatbhai that she could not come, as she had no money for her maintenance and to pay for the railway fare. It was in the month of May that the defendant's sons came to know of his marriage, and there was admittedly unpleasantness between him and his sons. On his return to Bombay he quarrelled with the plaintiff on May 19, and she said that she tore off the list of ornaments which the defendant had given her. The defendant denies this. He said there was no quarrel at all on the 19th, for he came to Bombay on the 21st to attend directors' meetings, and went back the same day. He did not see her, as he

refused to have anything to do with her. There was correspondence thereafter to which I shall refer later. In the correspondence the defendant denied the marriage, and the suit was filed on July 11, 1934.

12. The most important question in the suit is whether the plaintiff has made out a case for separate maintenance and residence. It is alleged in paragraph 8 of the plaint that she had been always ready and willing to live with the defendant and to carry out all his obligations as his wife, but the defendant declined to recognize her as his wife or to render to her here rights as such wife. The defendant denied this in paragraph 13 of his written statement, and has there alleged that notwithstanding the fact that the ceremony of marriage between him and the plaintiff was not a valid one, he was always willing until May 1934 that she should live with him at Ujjain as agreed. This would imply that at any rate thereafter he was not so willing. The plaintiff claims separate maintenance, presumably on the ground that she was virtually deserted by the defendant after he had first denied the validity of the marriage itself. It is true that she has not pleaded desertion in her plaint in so many words, though in her letter of May 28, 1934, she has charged the defendant with neglecting her, and in her attorneys' letter of June 18, 1934, she alleges that the defendant had "practically deserted" her. This case of desertion might have been pleaded more clearly, but it was clear from the very commencement of the hearing that her claim for maintenance was based on desertion, and evidence was led to that effect. In *Someshwar Dutt v. Tirbhawan Dutt*⁵ the Privy Council have expressed their disinclination to stress the structure of pleadings too strictly, if fair notice of the plaintiff's case has been given and issue joined on an inquiry but faintly adumbrated. There is no specific issue in this case as to desertion, but the question has to be considered in determining the issue whether the plaintiff is entitled to separate maintenance. It was argued by counsel for the defendant that the plaintiff's proper remedy on the alleged desertion was to have sued the defendant for restitution of conjugal rights. Whether she should or should not have done so is not a matter which is for me to consider. The most important question is whether she is entitled to separate maintenance, and before discussing the law on the subject I will deal briefly with the facts.

13. It is common ground that the plaintiff and the defendant came to Bombay from their tour on April 29. It is alleged that he paid her the sum of ₹ 50/- on April 17, but plaintiff denies this; it is most unlikely, as on that day they were on their tour. Defendant has

⁵(1934) L.R. 611. A. 224 : 36 Bom. L.R. 652

further alleged the payment of ₹ 150/- on May 8 in para. 41 of his affidavit dated August 2, 1934, on the notice of motion. Plaintiff denied having received that sum, and in his evidence defendant stated he did not remember whether he paid that sum or not. It appears that she received no payment in May, except that the defendant paid ₹ 50/- to a grain merchant for having supplied provisions to her. Defendant left for Ujjain about May 9, but he said that the plaintiff wanted to remain in Bombay and not to accompany him, to which he did not object. Thereafter she wrote to him the letter to which I have referred before, and the defendant sent the wire on May 12. He said that in spite of the incident of May 6, he wanted to give the plaintiff one more opportunity to mend. Plaintiff wrote back that she had not the money to go to Ujjain. Defendant denies that Popatbhai received such a letter, but Popatbhai has not been called, and in correspondence the defendant's attorneys have not explicitly denied the receipt of such a letter. All that they said was that the defendant was looking for it but could not find it. It is, however, clear that about this time

the defendant would have nothing to do any more with the plaintiff, for when he came to Bombay on May 21, he did not see her but left the same day for Ujjain. Correspondence ensued, and the plaintiff wrote her letter of May 28 in which she distinctly stated that she was starving for want of money for her maintenance, that she was neglected by the defendant, and she asked him to arrange for her maintenance and to see her about it. The defendant sent no reply. Thereafter she sent registered letters on May 29 to his address at Ujjain, Nepean Sea Road, and to his office. The first two letters were returned 'refused'. The letter addressed to his office was received by the defendant, but he sent no reply. The plaintiff next wrote through her attorneys on June 18, 1934, in which she set out her case and all the promises which she said the defendant had made to her. Even this letter was not accepted at first, and a copy was sent to the defendant along with the registered letter on June 20, to which he replied through Ms Ujjain pleader on June 23 denying the marriage, denying that he had made any promises, and asking her to refrain from making such false allegations in public; he also claimed ₹ 20,000/- damages for loss of reputation. It appears that about this time a reference was made in a magazine called the 'Bhatia Yuvak' to his marriage with the plaintiff. In a subsequent number of that magazine he put in a notice denying the marriage. In his written statement he persisted in denying the marriage, and until he went into the box he made no offer either to maintain her or to take her back or call her again to his house, in spite of her complaint that she had been starving and was neglected.

14. On these facts can it be said that the defendant deserted the plaintiff about the middle of May 1934? It is difficult to define what desertion is. There is no judicial definition of desertion that can be applied to meet the facts of every case, for the facts which constitute desertion vary with the circumstances and the mode of life of the married persons: see *Jackson v. Jackson*⁶ There must, however, be clear evidence of the intention on the part of one of the spouses to break off matrimonial relations with the other, for desertion is in its essence the abandonment of the one by the other with the intention of forsaking him or her. It was held in *Thompson v. Thompson*⁷ that to constitute wilful desertion on the part of the husband his absence and the cessation of cohabitation must be in spite of the wish of the wife, and that she must not be a consenting party to it. In a later case, *Fitzgerald v. Fitzgerald*⁸ it was observed by Lord Penzance at p. 698 that no one could desert who did

⁶[1924] P. 19.

⁸(1869) L.R. 1 P. & M. 694

⁷(1858) 1 S. & T. 231

not actively and willfully bring to an end an existing state of cohabitation. According to him "desertion means abandonment, and implies an active withdrawal from a cohabitation that exists". But it was held in *Pulford v. Pulford*⁹ that this was not an exhaustive definition of desertion, and that the conduct of the party charged must be looked at. There is no doubt that the defendant and the plaintiff were living together as man and wife until the desertion took place. They cohabited as husband and wife until the defendant left for Ujjain about May 9, and when he left he had no objection to the plaintiff remaining in Bombay. On May 12, he sent the wire from Ujjain, and it was thereafter that he ceased to have anything to do with her on the ground that she did not leave Bombay and join him at Ujjain. There is, however, no evidence that she was unwilling to do so, for I believe her, when she said that she wrote a letter to Popatbhai, the defendant's munim, stating that she could income as she had no moneys with her at the time. It is necessary in such cases as stated before to consider the conduct of both parties, and to see whether it was the husband who deserted the wife or whether the wife rather deserted her husband; and taking all the facts and circumstances into consideration I am of opinion that it was the defendant who deserted the plaintiff. He alleges misconduct on her part on May 6 which he has not been able to

prove. Thereafter he denied the marriage, and on his own admission refused to have anything to do with her. In the case of *Huxtable v. Huxtable*¹⁰ the husband wrote to the wife: " I am not going to have anything more to do with you as man and wife". In this case there is of course no writing, nor is it in evidence that the defendant said so to the plaintiff orally, but in fact this was what he meant by his conduct, as is now confirmed by his admission. It is the party who intends to bring the cohabitation to an end and whose conduct in reality causes its termination that commits the act of desertion: see *Sickert v. Sickert*¹¹

15. The question still remains whether the plaintiff is entitled to separate maintenance. The burden lies upon her to show the special circumstances which entitle her to a separate maintenance. Under the Hindu law the right of a wife to maintenance is a matter of personal obligation on the husband. It rests on the relations arising from the marriage, and is not dependent on or qualified by a reference to the possession of any property by the husband. The first duty of a Hindu wife, however, is to submit to her husband's authority and stay under his roof, and not to quit his house without any adequate excuse or justifying cause. If, however, the husband by reason of his misconduct, or cruelty in the sense in which that term is used by the English Matrimonial Courts, or by his refusal to maintain her, or for any other justifying cause, makes it compulsory or necessary for her to live apart from him, he must be deemed to have deserted her, and she will be entitled to separate maintenance and residence. Is the desertion of the plaintiff by her husband following upon a denial of the marriage a justifying cause for allowing her separate maintenance ? The texts collected in *Savitribai v. Luximibai and Sadasiv Ganoba*¹² seem to show that a husband who deserts a " faultless wife " or a wife "obedient to his commands" is bound to maintain her even though living apart. A wife forsaken without fault may, according to Yajnavalkya, even compel her husband to pay a third of his wealth, or if poor, to provide maintenance for her: see Colebrooke's Digest of Hindu Law, Vol. 2, Book IV, 72. This is, however, a penal provision, and has been rarely enforced by the Courts. It was enforced in *Ramabai v. Trimbak Ganesh Desai*¹³ against the husband's estate in the hands of his

⁹[1923] P. 18

¹¹[1899] P. 278.

¹³(1872) 9 B. H. C. R. 283

¹⁰(1899) 68 L. J. P. D. & A. 83

¹²I.L.R. (1878) 2 Bony 573, 597-98

coparceners, and this judgment was cited with approval in *Adhibai v. Cursandas Nathu*¹⁴

It was argued that the plaintiff was not " faultless ", nor was she " obedient" to the defendant's commands, and reliance was placed on certain portions of her evidence where she said that she was not willing at any time to live with the defendant as his wife unless he carried out his promises, viz., to provide her with a separate house and motor car, give her ornaments, and pay off her debts. A long question was put to her in cross-examination in that form, and she answered in the negative. But there are other answers in which she said that she was willing to continue to live with the defendant as his wife, and that she would be willing even now after all that had happened to live as his wife if he carried out his promises. It is true that she also said that she did not want to stay with him permanently at Ujjain. I will deal with the question of these promises and how far they are enforceable later on. But taking her evidence as a whole I cannot hold that she was unwilling, until she was deserted, to carry out her obligations as a wife. There is no evidence that before she was deserted she was at any time asked by the defendant to carry out her obligations as a wife, and she insisted on the fulfilment of the antenuptial ' promises as a condition precedent to the carrying out of her obligations. The fact, therefore, remains that she was deserted by her husband; and it is not his case that he deserted her because she called upon him to fulfil the promises which according to him he was not bound to do. The case of *Sitabai v.*

*Ramchandrarao*¹⁵, was a case in which the husband had subjected his wife to gross cruelty after making unfounded charges against her chastity which entitled her to separate maintenance, but it was held by Chandavarkar J. at p. 378 that cruelty was not according to Hindu law necessary in order to entitle the wife to separate maintenance if she has been unjustifiably abandoned or forsaken by the husband. Defendant's counsel further relied upon the offer made by the defendant, not in his examination-in-chief, but for the first time in cross-examination, in answer to a question by the plaintiff's counsel, that he was willing to take the plaintiff back if she came and lived with him at Ujjain, and his counsel repeated the same offer in his closing address. The Court is entitled to consider the bona fides of the husband's offer to return to his wife. But in my opinion the defendant's offer was not bona fide. It was not only belated, but was evidently prompted more by a desire to avoid the risk of payment of separate maintenance rather than by a desire to take back the plaintiff as his wife. Is the plaintiff bound to accept such an offer from a husband who had first denied the validity of the marriage and then deserted her? Defendant's counsel contended that in order to entitle the plaintiff to separate maintenance she must show that she was always ready and willing to perform her obligations as wife, even after the desertion, and to go and live with the defendant as his wife. This, however, is not a suit for restitution of conjugal rights. It is a case for maintenance on the ground of desertion or abandonment without just cause. It was not she who quieted her husband's house of her own accord and without an adequate excuse, but it was the husband who refused to have anything to do with her after denying the validity of the marriage, and thereafter virtually refused to maintain her. See *Sidlingapa v. Sidava kom Sidlingapa*¹⁶ in which it was held that a wife could claim separate maintenance if the husband refused to maintain her in his house. Counsel relied on *Tekait Man Mohini Jemadi v. Basanta Kumar Singh*¹⁷ in which it was held that it was not only a duty imposed upon a Hindu wife but a rule of the Hindu law that she must remain with her husband wherever he may choose to reside. That rule was considered in

¹⁴ I.L.R. (1886) 11 Bom. 199

¹⁶ I.L.R. (1878) 2 Bom. 634

¹⁵(1910) 12 BOMBAY LR 373

¹⁷ I.L.R. (1901) Cal. 751

the case, because of an antenuptial agreement one part of the husband that he would never and under no condition be at liberty to remove his wife from her mother's house, and would always carry out the mother's orders, and it was held that the agreement was not only void as being against the rule of Hindu law, but void on the ground of public policy. Such a rule cannot be imposed upon a wife who has been abandoned by her husband. Reliance was placed in that case upon a passage from Mayne's Hindu Law, which in the 9th edn. is at p. 651, and runs as follows:-

If she quits him of her own accord, either without cause, or on account of such ordinary quarrels as are incidental to married life in general, she can set up no claim to a separate maintenance. Nothing will justify her in leaving her home except such violence as renders it unsafe for her to continue there, or such continued ill-usage as would be termed cruelty in g. an English matrimonial Court...

16. It was, however, pointed out in *Shinappaya v. Rajamma*¹⁸ that the enumeration of causes in this passage was not exhaustive. In the case of *Sitanath Mookerjee v. Sreemutty Haimabuly Dabee*¹⁹ Garth C. J. expressed the opinion that a wife could leave her husband's house only on the ground of his cruelty, but that view is not now accepted as correct. As was pointed out by Chandavarkar J., it is not necessary to prove cruelty in order to entitle the wife to separate maintenance, if the husband has really deserted her.

17. It is true that the Hindu law enjoins implicit obedience on the wife. Her husband is to her as a "god" or "deity", and to be regarded as such. But I do not think that the Hindu law goes so far as to allow a husband to first abandon his wife, then to deny the validity of the marriage, then to neglect her and to refuse to have anything to do with her, and when she is driven to seek redress in a Court of law, to call upon her to show that though abandoned without just cause, she was still ready and willing to go and live with him as her husband. I do not think that the husband could under such circumstances defeat his wife's claim for separate maintenance by making an offer or rather the pretence of an offer to take her back in his house. It is no doubt difficult to deduce a general and definite rule from the various texts and authorities as to the causes which will in law justify the wife in leaving her husband's home. But if she has not quieted it of her own accord, and the husband denies that he was legally married to her and then forsakes her as if she was a total stranger to him and had no claim upon him for support, I think it is but fair and equitable to grant her the relief which she claims, provided there is no reasonable doubt about her chastity at the time she seeks that relief. No doubt, she was a "naikin" for some time previously, but defendant willingly married her, and there is no allegation against her chastity after marriage except the allegation of misconduct on May 6, which, as I have held before, has not been proved. The Hindu law does not recognize divorce, and a claim for separate maintenance is, apart from Section 488 of the Criminal Procedure Code, the most effective remedy which the Hindu wife has against the husband's injustice, or cruelty, or neglect.

18. I might here refer to the case of *Bai Jivi v. Narsing*²⁰ in which it was held that a husband could not get a decree straightaway for restitution of

¹⁸I.L.R. (1922) Mad. 812

²⁰(1926) 29 Bom. L.R. 332

¹⁹(1875) 24 W. R. 377

conjugal rights in a suit which was filed after he had deserted his wife, and after she had obtained an order for maintenance under Section 488 of the Criminal Procedure Code, without hearing the wife in her defence, and without investigating the conduct of all the parties, as in the opinion of the Court the suit might well have been merely a device to avoid the husband's just obligation to provide for his wife's maintenance. The conduct of the parties is certainly a matter for consideration, and considering the defendant's conduct towards his wife after May 12, it appears to me that the fault for the desertion and consequent separation, lies really at his door. In my opinion the plaintiff is entitled to separate maintenance and residence. It may, however, be pointed out that even a 'decree for maintenance may be set aside on the ground of the wife's subsequent misconduct: see *Kandasami Pillai v. Murugamma*²¹ An unchaste wife is not entitled to anything but a "bare" or "starving" maintenance, and even that may be forfeited if she continues or persists in her unchaste life.

19. I will now deal with the plaintiff's claim for ornaments and payment of her debts. Defendant's counsel argued that if these antenuptial agreements were in fact made, they could not be enforced, because the agreements, viz., to keep the plaintiff in Bombay, to provide her with a separate house and car, to give her ornaments and pay her debts, all hang together, and if the agreement to stay in Bombay could not be enforced on the ground that it was against Hindu law, the other agreements could not be enforced too. I do not agree with the contention that all these agreements must hang or fall together. The agreement to live in Bombay stands apart from the agreement to give her ornaments and pay off her debts, though made at the same time. I need not consider the promise to provide her with a house and a car, because no relief is claimed on

account of the same. It has been held that an antenuptial agreement that the married parties shall not live together or shall live separately is void both under the English and under the Hindu law: see *Krishna Aiyar v. Balammal*²² It is also opposed to public policy. The same principle was affirmed by Batchelor J. in *Meherally v. Sakerkhanoobai*²³ in the case of Khojas. An agreement, however, to remain in Bombay after marriage is not an agreement which offends against the marital rights of husband and wife, nor is it against public policy, unless it was an agreement to live for all time or permanently in Bombay, in which case it would impose a restriction on the rights of the husband which if enforced might practically lead to the separation of husband and wife. It has not been proved to my satisfaction that there was an agreement under which the parties were to live for all time in Bombay, but I believe the plaintiff when she said that the defendant did promise to live with her in Bombay after the marriage. He knew that she had a large establishment at Abubakar Mansion with furniture and servants and relations staying with her. No attempt was made by the defendant to have that house vacated after marriage, and I do not believe the defendant when he said that the plaintiff told him that she would arrange that notice was given to the landlord to vacate, or that she actually sent away some of her furniture to her native place. On the other hand there is evidence that after the marriage the defendant made up a memo, of expenses in his own handwriting in Bombay in which he exhorted his wife to curtail expenses from ₹ 300/- to ₹ 200/- per month. One of the items of expenses is rent, and that meant rent for a house in and not outside Bombay. Moreover, the defendant himself has written on that memo. " We want to make it as follows ", meaning that he and the plaintiff would like to cut down

²¹ I.L.R. (1895) 19 Mad. 6

²³(1905) 7 Bom. L.R. 602

²² I.L.R. (1910) Mad. 398

their expenses of living in Bombay in the manner indicated by him. The question, however, does not arise, for it is not alleged that defendant deserted the plaintiff because she refused to remain with him anywhere else than in Bombay. If she was deserted, there was nothing to prevent her from living where she chose. If she now offers to live with the defendant on certain conditions, he is not bound to accept them, but that does not affect her right to separate maintenance and residence on the ground of desertion.

20. The agreement to give ornaments is a separate agreement altogether, though made at the same time. An antenuptial agreement followed by a marriage is valid and good. It has been held that marriage is a valuable consideration of the highest order: for such a contract see *Synge v. Synge*²⁴ and the contract is enforceable. I believe the plaintiff, when she said that defendant told her he would give her ornaments if she married him, and it is admitted that some ornaments were given to her, but the evidence is not sufficient to prove that the ornaments he is alleged to have shown her at Ujjain are the ornaments mentioned in the list annexed to the plaint, nor that he mentioned the prices to her and agreed to give her ornaments worth ₹ 35,000/-. It has also not been proved that the ornaments were on her person for two or three days after the marriage nor that the defendant took possession of them at an intermediate station on the way from Ujjain to Bombay. It is not even stated in the attorneys' letter of June 18 that any ornaments were shown to the plaintiff at Ujjain. In my opinion the contract is unenforceable, not because it is against public policy, but for want of certainty.

21. With regard to the payment of debts the plaintiff's case is weaker still. There is no proof that these debts are owing by her, and no creditor has been called to prove any. It is also significant to

note that among the promises which according to Narsinhrao were made by the defendant to the plaintiff he does not mention the payment of her debts.

22. The plaintiff is, therefore, entitled to the declaration she seeks for, and to an order for separate maintenance and residence, but not for any order in respect of the ornaments and the debts. No exact rule can be laid down as to the amount claimable for maintenance. Every case has to be judged on its own facts. In determining the amount, however, the Court usually takes into consideration the reasonable wants of the plaintiff, her position in life, her husband's means and income, as well as the mode of the former life of herself and her husband. She can claim maintenance even when she has property of her own, though that fact is also to be taken into account in determining the quantum. The law on the subject was stated by the Privy Council in *Ekradeshwari Bahuasini v. Homeshwar Singh*²⁵ as follows (p. 845) :-

... maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and mode of living, and to the age, habits, wants, and class of life of the parties.

These observations were made in respect of a widow's maintenance, but they would apply generally also in the case of a wife. In order to determine the amount

²⁴[1894] 1 Q. B. 466

²⁵I.L.R. (1929) Pat. 840 : 31 Bom. L.R. 816

payable to the plaintiff there is generally a reference to the Commissioner of this Court to ascertain the value of the husband's estate and his means or income, but it is not always necessary: see *Bhikubai v. Hariba*²⁶ though that was a case in which only the amount of bare maintenance was to be assessed. I do not think that in this case any useful purpose will be served by making such a reference, as the defendant's property and income have been sufficiently investigated in the course of the evidence. Taking everything into consideration I think the fairest order I can make is to award the plaintiff ₹ 100/- per month for her separate maintenance and residence during her natural life. Defendant to pay the said sum to the plaintiff, or her attorneys, as she may direct, on or before the 10th day of each month; the maintenance amount to be paid from the month of August last.

23. Declaration in terms of prayer (a) of the plaint. Defendant to pay ₹ 100/- per month to the plaintiff as directed in the judgment. Defendant to pay the plaintiff's costs of the suit, costs to be taxed as between attorney and client: see Halsbury, Vol. XVI, para 872, at p. 428. Costs to include the costs of the de bene examination and of counsel's appearance thereon.

Liberty to apply.

²⁶(1924) 27 Bom. L.R. 13